UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	.	Chapter 11
	.	Case No. 23-10831(MFW)
LORDSTOWN MOTORS CORP., et al,	.	
	.	824 Market Street
	.	Wilmington, Delaware 19801
Debtors.	.	
. . . . .	.	Thursday, October 5, 2023

TRANSCRIPT OF HEARING RE:
DEBTORS' APPLICATION TO RETAIN AND EMPLOY RICHARDS, LAYTON & FINGER, PA AS CO-COUNSEL EFFECTIVE AS OF THE PETITION DATE
BEFORE THE HONORABLE MARY F. WALRATH
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES VIA ZOOM:

For the Debtors:	Kevin Gross, Esq. Daniel J. DeFranceschi, Esq. James F. McCauley, Esq. Corey Kandestin, Esq. Robert Stearn, Esq. Daniel White, Esq. RICHARDS, LAYTON & FINGER, PA David M. Turetsky, Esq. Doah Kim, Esq. David Kim, Esq. WHITE & CASE, LLP
For the U.S. Trustee:	Benjamin Hackman OFFICE OF THE U.S. TRUSTEE

(Appearances Continued)

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APPEARANCES VIA ZOOM: (Continued)

For the Official Committee of Unsecured Creditors:	Francis Lawall, Esq. Tori Remington, Esq. Deborah Kovsky-Apap, Esq. TROUTMAN PEPPER HAMILTON SANDERS, LLP
For the Official Committee of Equity Security Holders:	Eric Monzo, Esq. MORRIS JAMES, LLP
Also Appearing:	Melissa Leonard LORDSTOWN MOTORS CORP.
	Andrew Sole ESOPUS CREEK VALUE SERIES FUND LP
	Stephen Lam CORRE PARTNERS
	Jeff Kaplan BCAS
	Emily MacKay, Observer
	Livy Mezei, Interested Party on behalf of the Debtors
	Jessica Steinhagen, Interested Party
	Becky Yerak WALL STREET JOURNAL
	Jeremy Hill BLOOMBERG
	Amelia Pollard BLOOMBERG NEWS

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(Proceedings commence at 10:30 a.m.)

THE COURT: All right. Good morning. This is Judge Walrath. We're here in the Lordstown Motors case.

I will turn it over to counsel for the debtor to get us started.

MR. DEFRANCESCHI: Good morning, Your Honor. Dan DeFranceschi from Richards, Layton & Finger.

THE COURT: Good morning.

MR. DEFRANCESCHI: For some reason, my -- there we go. I couldn't get my video to work, I apologize for that.

THE COURT: Okay.

MR. DEFRANCESCHI: If it pleases the Court, for the record, Dan DeFranceschi from Richards, Layton & Finger, proposed counsel to the debtors.

Your Honor, thank you for setting aside time this mornign to hear the debtors. As Your Honor is aware, there is one remaining item on the agenda for today, and that is the application of the debtors to retain Richards, Layton & Finger, and I do want to get to that in a moment, Your Honor.

But if it pleases the Court, I have with me co-counsel, David Turetsky from White & Case. And we thought it might be appropriate, if it pleases Your Honor, to hear a brief status report on where things are and how they've been developing in the case, generally.

And after that, we would propose to turn it over to

Mr. Stearn from my office to address the item on the agenda.

THE COURT: Thank you. Mister --

MR. DEFRANCESCHI: Thank you, Your Honor.

THE COURT: Mr. Turetsky.

(No verbal response)

THE COURT: You're muted.

(Pause in proceedings)

MR. DEFRANCESCHI: Your Honor, I apologize for the technical difficulties this morning.

Mr. Turetsky, we still can't hear you. I wonder if --

THE COURT: He's getting --

MR. DEFRANCESCHI: -- if we could just have one moment.

THE COURT: He's getting IT to solve the problem. we all need --

MR. DEFRANCESCHI: Thank you, Your Honor.

THE COURT: -- our IT teams.

MR. DEFRANCESCHI: Thank you.

MR. TURETSKY: Can you hear me now, Your Honor?

THE COURT: Yes, I can, Mr. Turetsky.

MR. TURETSKY: Well, I apologize for that, Your Honor. But it is very nice to see you and to be heard by you.

THE COURT: Okay.

MR. TURETSKY: So thank you for making time.

For the record, David Turetsky of White & Case on behalf of the debtors.

Your Honor, I'm going to be brief. We did think it would be helpful for Your Honor to hear a very brief update on transpirings in the case and the progress that we've been making.

First, Your Honor, we'll note that there is a new official committee that has been appointed in these cases. It's a little bit under a month old. But on September 7th, the United States Trustee appointed the Official Committee of Equity Security Holders in the Chapter 11 cases.

The equity committee consists of three equity holders: Crestline Management, Pertento Partners, and Esopus Creek Value Series Fund. They have proposed to retain the Brown Rudnick and Morris James firms as their counsel and M3 Partners as their financial advisor. And I am sure you will be seeing and hearing from them shortly. Just Robert Stark and Bennett Silverberg are being charged from Brown Rudnick; Eric Monzo, who I see on the screen, from Morris James and Robert Winning of M3.

Since its appointment, the debtors have worked closely with the equity committee's advisors to help them get up to speed, and so that we can all make quick strides towards hopefully achieving a consensus and resolving the

issues of this case with the objective of having a resolution of these cases by year-end.

And we've also, of course, continued to work with the creditors' committee and its advisors towards those same objectives.

And we've been making progress, and I'd like to highlight on two fronts:

The first, on the plan and disclosure statement front, we did file a proposed plan and disclosure statement on September 1st.

Prior to filing the proposed plan and disclosure statement, the debtors did engage with -- in substantial negotiations and discussions with the creditors' committee. I'm not going to represent to the Court that the creditors' committee was fully on board with what was filed, but there was an understanding that the parties would continue to negotiate and discuss, hopefully to achieve a consensus. And we've continued to do that with the creditors' committee and, obviously, with the equity committee since its appointment.

We filed our solicitation procedures motion on September 22nd, and each of the disclosure statement and the solicitation procedures motion are set for a hearing before Your Honor on October 18th. We anticipate that we'll file an amended plan to reflect the fruits of our discussions with the equity committee, the creditors' committee, and other

comments that we've received from the U.S. Trustee and others. Hopefully, it will resolve the issues that folks have, never any guarantees, but that's our hope. Our hope is to proceed by consensus if we can. So that's the plan and disclosure statement update.

On the sale process front, as Your Honor is aware, one of the key aims of the Chapter 11 cases was to market and sell some, all, or substantially all of the debtors' assets. And here, too, we've progressed things.

To that end, after consulting with each of the committees -- and I'll pause and note the equity committee obviously had not been appointed when Your Honor entered the bidding procedures order. We've treated them as a consultation party for all purposes. I just want to be clear about that.

The debtors did extend the bid line -- deadline several times to give parties some additional time to formulate their bids. And although the debtors received multiple proposals from interested parties, they received a single qualified bid from LAS Capital.

And accordingly, on September 29th, again, after consulting with each of the committees, the debtors announced the cancellation of the auction and the selection of LAS Capital as the successful bidder. And we will be presenting an APA to Your Honor and sale to Your Honor to LAS capital on

October 18th.

The sale, which is set forth more specifically in the APA, will be of certain assets -- and those assets are the assets that relate to the Endurance, including IP and other tangible assets -- for an aggregate cash purchase price of $10 million. Again, we -- not up for today, but we do look forward to presenting that sale to Your Honor on October 18th.

And unless has any questions, I'm content to turn it over to our co-counsel Richards Layton -- or proposed co-counsel.

THE COURT: Thank you. All right.

MR. TURETSKY: Thank you, Your Honor.

THE COURT: Thank you for the update.

And Mr. Stearn, you may proceed then on our remaining matter.

MR. STEARN: Thank you. Good morning, Your Honor, and may it please the Court. Bob Stearn from Richards, Layton & Finger, proposed Delaware counsel for the debtors.

Can you see and hear me okay?

THE COURT: I can.

MR. STEARN: Thank you.

Your Honor, as you've heard, we're here on debtors' application to retain Richards, Layton & Finger as Delaware co-counsel.

We have some evidence to introduce this morning, then we'll proceed to argument. The evidence is coming in on an uncontested basis, so that portion of the hearing shouldn't take very long. And for the debtors, it will be handled by Mr. Kandestin. And with the Court's permission, I'll turn the virtual podium over to him.

THE COURT: All right. Mr. Kandestin.

MR. KANDESTIN: May it please the Court, for the record, Corey Kandestin, Richards, Layton & Finger, proposed counsel to the debtors.

As Mr. Stearn mentioned, I'll address the evidentiary portion of the hearing today. And I am happy to report that the debtors and the U.S. Trustee have agreed on the admission of testimony and exhibits into the record to streamline today's hearing.

In terms of testimony, the parties have agreed to admit the declarations that were filed in support of the application. There is no additional testimony being offered beyond those declarations. And my understanding is that the U.S. Trustee is not intending to take cross on the declarations.

In terms of exhibits, the parties have put together a joint list of exhibits and they have agreed to admit the exhibits on that list. And my understanding is that the Court has received a virtual binder of exhibits, so you

should have those.

What I propose to do then is to take the two declarants one by one and move their declarations into evidence and then turn to the exhibit list and collectively move those in after that, if that's okay with the Court.

THE COURT: That is fine.

MR. TURETSKY: The first declarant is Mr. Kevin Gross. Mr. Gross' declaration is attached to the retention application as Exhibit B. That's at Docket Number 89-3.

Mr. Gross also filed two short supplemental declarations, they're at Docket Numbers 223 and 244.

He is present today in the courtroom via Zoom, I see him up on the screen.

And with that, I now move to admit Mr. Gross' declarations at Docket Numbers 89-3 and 223 and 244 into evidence.

THE COURT: Thank you.

Any objection?

MR. HACKMAN: Good morning, Your Honor. And may it please the Court, this is Ben Hackman for the U.S. Trustee. I'm also joined by my colleague Linda Richenderfer today.

Can Your Honor hear me okay?

THE COURT: I can.

MR. HACKMAN: Thank you, Your Honor.

I rise to confirm that we have no objection to

entry of those declarations.

THE COURT: All right. Thank you, Mr. Gross. I'll admit the declarations and they are part of the record.

MR. GROSS: Thank you, Your Honor.

(Gross Declarations received in evidence)

MR. TURETSKY: Thank you, Your Honor.

The debtors' second declarant is Ms. Melissa Leonard, general counsel to the debtors. She submitted a declaration that was attached as Exhibit C to the application, that's at Docket Number 89-4.

Ms. Leonard is present in the courtroom via Zoom, she is up on the screen.

And I now move to admit into evidence Ms. Leonard's declaration.

THE COURT: Thank you. I see she is here, present.

Mr. Hackman, any objection?

MR. HACKMAN: No objection, Your Honor.

THE COURT: All right. Her declaration is admitted as part of the record then.

(Leonard Declaration received in evidence)

MR. KANDESTIN: Thank you, Your Honor.

And that leaves us with the exhibit list. The amended exhibit list is located at Docket Number 509. And as I mentioned before, this is a joint list put together by both the debtors and the U.S. Trustee, so it has both of our

exhibits, and we've agreed to admit those into evidence for today's hearing.

So, based on that agreement, I now move to admit the exhibits listed on the amended joint exhibit list into the record.

THE COURT: All right. And that's agreed to, Mr. Hackman?

MR. HACKMAN: Yes, Your Honor. We have no objection to entry of those exhibits.

THE COURT: All right. Then, for purposes of the record, I will admit Exhibits 1 through 44 on the amended exhibit list.

(Exhibits 1 through 44 received in evidence)

MR. KANDESTIN: Thank you.

And that concludes the evidentiary presentation by the debtors. So I will turn the podium back over to Mr. Stearn.

THE COURT: Mr. Stearn.

MR. STEARN: Thank you, Your Honor.

Again, we're here on the debtors' application to retain Richards, Layton & Finger as Delaware co-counsel. There is only one objection from the Office of the United States Trustee, which contends that Richards, Layton & Finger has a conflict and should be disqualified from representing the debtors.

The debtors respectfully submit that the United States Trustee's position is misguided based largely on a misapplication of applicable law and a failure to consider important facts. And the factual record before the Court today si substantial. It is also undisputed and unrebutted and it supports granting the debtors' application.

Let me start with a brief overview, Your Honor, of applicable law.

Under Section 327(a), with the Court's approval, the debtor may employ counsel that, quote:

"-- do not hold or represent an interest adverse to the estate and that are disinterested persons."

There is no argument that Richards, Layton & Finger holds an interest adverse to the estate or is not disinterested under Section 101(14). The U.S. Trustee's only argument is that Richards, Layton & Finger, quote, "represents an interest adverse to the estate."

Now the Code doesn't find -- define -- excuse me -- "interest adverse to the estate," but the Third Circuit has provided guidance. As the District Court noted in Boy Scouts -- and this is 630 B.R. at 130 -- quote:

"The Third Circuit has, therefore, instructed that a professional holds a prohibited adverse inference where that professional holds or represents interests in competition with the debtor that would

actually, as opposed to speculatively, impair its service as an estate fiduciary."

I would ask the Court to keep in mind the Third Circuit's important distinction between "actually" and "speculatively."

Now, citing out-of-circuit case law, the United States Trustee contends that "adverse interest" includes:

"-- any interest that even faintly would color the professional's independence and impartial attitude."

That's in the objection at Paragraph 20.

But as we note in our reply at Paragraph 48, in Marvel, the Third Circuit expressly rejected that approach as, in the words of the Third Circuit, "faulty reasoning."

There are some additional principles that guide our discussion today, Your Honor:

First, the Court's evaluation of adverse inference effectively is a conflicts analysis. Where the conflict is actual, counsel must be disqualified. Where the conflict is potential, disqualification is at the Court's discretion. And where there is simply an appearance of conflict, counsel may not be disqualified.

I would similarly note that, under Section 327(c), counsel is not disqualified from employment by the estate simply because it also represents a creditor. There must be

an actual conflict of interest.

The second principle that guides our discussion today, Your Honor, is that this Court has considerable discretion to determine whether conflicts actually exist based on the facts and circumstances of the case.

And importantly, as the District Court noted in Boy Scouts, the Third Circuit requires that the Court assess the facts and circumstances from the perspective of the estate, not the objector. So the U.S. Trustee's perspective on conflicts is not controlling.

The Court also should consider whether other counsel, such as conflicts counsel, are available to represent the debtors where any adversity may exist.

And third, Your Honor, the burden of proof to demonstrate a disqualifying conflict falls on the United States Trustee as objector, and again, it must do so with facts, not speculation.

So let's start with the issue of whether the United States Trustee has met its burden of demonstrating an actual conflict. Once again, Your Honor, the Code does not define "actual conflict of interest." The Third Circuit informs us that the determination is to be made on a case-by-case basis.

And the Third Circuit has provided further guidance, for example, in Boy Scouts. And here, I'm quoting from 35 F.4th at 158, quote:

"Pragmatically, a conflict is actual when the specific facts before the ... court suggest that 'it is likely that a professional will be placed in a permission'" -- "'in a position'" -- excuse me -- "'permitting it to favor one interest over an impermissibly conflicting interest.'"

And once again, I would keep in mind the Third Circuit's admonition of "likely."

So let's turn to the robust factual record before Your Honor. I want to start with a quick overview of the pending litigation, which is described in detail in our briefing and exhibits, and in particular:

The Kroll declaration, which is Exhibit 4, at Paragraphs 54 to 57;

The Gross declaration, which is Exhibit 5, at Paragraphs 22 to 23;

The complaints, which are Exhibits 9, 10, and 43;

The docket sheets for litigations, which are Exhibits 17 to 20;

The insurance coverage letter for the direct action, which is Exhibit 33;

And the August 3rd, 2023 transcript of the hearing, at which Your Honor made certain rulings regarding insurance coverage in the direct action, and that's at Exhibit 21.

And Your Honor, I hope you're not scrambling to

call up all these exhibits. I'm simply telling you what I'm summarizing from.

THE COURT: Okay.

MR. STEARN: Your Honor, there are four relevant litigations that are generally arising out of alleged misrepresentations regarding the debtors' business prospects at or about the time of the DiamondPeak merger. These litigations were commenced in 2021. Richards, Layton & Finger is Delaware co-counsel to current or former directors in three Delaware litigations.

The first litigation I want to summarize for Your Honor is the Northern District of Ohio securities class action. That litigation was brought against certain debtors and D&O defendants. Richards, Layton & Finger is not involved in that case, it's in Ohio. But the case is important because it directly affects the cases in which Richards, Layton & Finger is involved.

A motion to dismiss the complaint in the Ohio securities class action was fully briefed and pending since March of 2022. Discovery and other activity in that case was stayed pending resolution of the motion to dismiss.

And after the debtors' bankruptcy filing, the Ohio District Court recognized the automatic stay and, based thereon, denied the motion to dismiss subject to refiling it after the automatic stay was lifted, effectively resetting

the clock on the motion to dismiss.

The second action I want to summarize quickly for Your Honor is the Delaware Chancery Court direct action. Richards, Layton & Finger is Delaware co-counsel to five former or current directors and officers. The debtors are not parties in that case.

It's a putative class action involving direct claims of shareholders, not derivative claims belonging to the debtors. This is the action in which the debtors unsuccessfully sought to extend the automatic stay. It's currently proceeding and scheduled to go to trial in 2024. The attorneys' fees there that come due and owing in that case are the direct obligation of the individual defendants, not the debtors. And as Your Honor noted in the August '23 hearing, the attorneys' fees for that case are being paid directly by the D&O insurer.

The third case I want to summarize for Your Honor is the Delaware District Court derivative action. Richards, Layton & Finger is Delaware co-counsel to four former directors of the debtors' predecessor DiamondPeak. Nothing of substance is happening in that case, which has been stayed pending resolution of the Ohio motion to dismiss. The District Court also recognized the effect of the automatic stay on that case. Again, attorneys' fees in that case are a direct obligation of the defendants, not the debtors.

And the final case that I would summarize quickly for Your Honor is the Delaware Chancery Court derivative action. Richards, Layton & Finger is Delaware co-counsel to the same defendants as the direct action. There is nothing of substance happening in the case, which has been stayed pending resolution of the Ohio motion to dismiss. And once again, attorneys' fees are the direct obligation of the defendants, not the debtors.

So, Your Honor, these litigations were pending when Richards, Layton & Finger was contacted about representing the debtors. How did Richards, Layton & Finger deal with that fact? By being up front and proactive, as reflected in:

The Gross declaration, which, again, is before you as Exhibit 5;

Richards, Layton & Finger's engagement letter, which is Exhibit 11;

And the consent and waiver letters, which are Exhibits 12 to 16.

To quickly summarize, Your Honor:

First, Richards, Layton & Finger expressly carved out of its representations of both the debtors and the defendants any disputed matters between them. In fact, Richards, Layton & Finger cannot represent the defendants in any matter whatsoever in this bankruptcy case, whether that matter is disputed or not. And the debtors and the director

defendants signed off on these limitations and agreed that other counsel would represent them in any disputed matters.

So, for example, Your Honor, if you consider the analogy of a Venn diagram where you have two circles that partially overlap, here, we have two circles that don't come close to each other. The representations that Richards, Layton & Finger has of the debtors and of the directors contain no overlap whatsoever.

And at the creditors' committee's request, that limitation is also reflected in the proposed retention order, which is at Exhibit 22. Paragraph 6 of the proposed retention order provides as follows, Your Honor, quote:

> "RLF shall refrain from involvement in any matters bearing directly on the defendants, as defined in the Gross declaration, in the Chapter 11 cases, such as any adversary proceeding or direct contested dispute involving the defendant; or the drafting, negotiation, or litigation of any release or exculpation provisions affecting a defendant that may be included in any proposed plan of reorganization."

The second thing Richards, Layton & Finger did, Your Honor, is, consistent with the Rules of Professional Responsibility, Richards, Layton & Finger obtained waivers and consents from both the debtors and the defendants.

Third, Your Honor, Richards, Layton & Finger ensured that no professionals involved in the representation of the defendants would be involved in the representation of the debtors and vice-versa. That was actually pretty easy for us to do. The defendants are represented by members of Richards, Layton & Finger's corporate department and the debtors are represent by members of Richards, Layton & Finger's bankruptcy department, and there is no crossover of personnel between those departments. The attorneys actually are also on different floors.

And the fourth thing Richards, Layton & Finger did, Your Honor, was institute an ethical screening wall. And among other things, this means that Richards, Layton & Finger corporate and bankruptcy attorneys cannot talk to each other about their cases and have no access to each other's electronic or hard copy files. Richards, Layton & Finger attorneys, also, not surprisingly, can't act against each other or negotiate with each other.

Now, Your Honor, in the United States Trustee's view, none of these facts matter, and Richards, Layton & Finger's representation of defendants in the direct and derivative actions disqualifies Richards, Layton & Finger from representing the debtors effectively as a matter of law. But the Third Circuit requires this Court to evaluate the facts and the circumstances, and those facts and

circumstances demonstrate that there is no disabling conflict here.

And to demonstrate why, let's look briefly at the United States Trustee's arguments. I'll start, Your Honor, with the direct action.

The United States Trustee argues that Richards, Layton & Finger suffers an actual conflict of interest because the debtors' scheduled indemnification claims for the defendants in the direct action, pursuant to bylaws and employment agreements -- which, by the way, are included in the exhibit list as Exhibits 25, 26, and 37 to 40.

But Your Honor, what are the facts with respect to indemnification claims?

First, the direct action is not currently resulting in indemnification claims against the debtors. As the Court determined at the August 3 hearing, attorneys' fees for the direct action are being covered by D&O insurance. That's in the transcript, that's at Exhibit 21.

I would also note that, as the United States Trustee states in its objection at Paragraph 27, a decision could result in no indemnification claims. Your Honor also so noted that fact in the August 3 transcript.

And the debtors also reserve the right in their schedules to eject -- to object -- excuse me -- to indemnification claims.

Second, Your Honor, Richards, Layton & Finger played no role in the scheduling of indemnification claims on behalf of either the debtors or the defendants, as made clear in the Gross declaration and in Richards, Layton & Finger's engagement letter and waiver and consent letters. And again, these are Exhibits 5 and 11 through 16.

Indemnification claims are expressly carved out of Richards, Layton & Finger's representation on both sides of the equation because Richards, Layton & Finger cannot represent the parties on any matter that's in dispute between them. So Richards, Layton & Finger is not representing competing economic interests with respect to indemnification because Richards, Layton & Finger has no involvement on either side of that issue. If indemnification ever became an issue in this bankruptcy case, it would be handled by other counsel for both the debtors and the defendants.

So, Your Honor, given those facts, where is Richards, Layton & Finger's actual conflict in this bankruptcy case on indemnification? The facts and circumstances demonstrate that there is none here.

And Your Honor, let's look at the derivative actions. The United States Trustee argues that Richards, Layton & Finger suffers from an actual conflict of interest because the debtors have an interest in maximizing the value of derivative claims and the defendants have an interest in

minimizing the value of those claims. That sounds good when you say it fast. But again, what are the facts?

First, the derivative actions have not progressed beyond the motion to dismiss stage. They have been stayed for more than a year pending resolution of the Ohio motion to dismiss.

The derivative claim -- complaints -- excuse me -- allege claims for, among other things, breaches of fiduciary duty under Delaware law. And under Delaware law, in a derivative action, there generally is no conflict between a corporation and its directors at the motion to dismiss stage.

The cases we've cited in our reply brief at Paragraph -- excuse me -- 39 make clear that, at the motion to dismiss stage, quote:

"Delaware law regards the interests of the corporation as aligned with those of the individual defendants."

And, quote:

"A law firm may represent all defendants without impropriety."

The United States Trustee's assumption that a conflict must exist here is actually inconsistent with the law on which most of those derivative claims are based. Rather, that law provides there is no conflict.

But Your Honor, let's ignore the fact of no

conflict and talk about several additional reasons why Richards, Layton & Finger is not conflicted here.

First, it's implausible that the derivative actions would proceed during this bankruptcy case. They are stayed pending resolution of the Ohio motion to dismiss, which itself cannot be taken up again until after the automatic stay expires. The derivative actions also are separately stayed due to the automatic stay.

Under the plan, the derivative claims -- and the plan is also an exhibit, I should note it's Exhibit 27. Under the current version of the plan, derivative claims will vest in the post-effective-date debtors, who are authorized to prosecute and resolve them. That's Plan Articles 5(e), 5(g), and 5(j). So, Your Honor, as a practical matter, nothing will be litigated in the derivative cases until after plan confirmation, if ever.

Finally, Your Honor, to the extent any aspect of the bankruptcy case involves the derivative actions, Richards, Layton & Finger's engagement expressly carves out its participation on behalf of either the defendants or the debtors. So the debtors aren't asking the Court to approval a dual representation because there isn't one here. Richards, Layton & Finger can take no action in the bankruptcy case regarding matters specific to the derivative claims on behalf of either party.

In fact, the debtors have retained special litigation counsel, Winston & Strawn, to investigate and evaluate derivative claims. The order approving Winston's retention is one of the exhibits, it's Exhibit 44.

And I don't need to tell Your Honor what that order says because you signed it yesterday. But Paragraph 4 of the order expressly provides that the creditors and equity committees have a common interest with the debtors with respect to win man's -- excuse me -- Winston's findings and work product, and that debtors shall advise the committees of Winston's conclusions and the basis therefor.

So, Your Honor, what are the facts and circumstances with respect to the derivative actions? At this stage of the derivative cases, under Delaware law, there is no conflict between the debtors and the directors. The derivative actions will not move forward during this bankruptcy case. And the debtors' analysis of the derivative -- excuse me -- of the derivative claims will be handled by litigation counsel, overseen by the watchful eyes of two committees, whose interest is to maximize the value of derivative claims.

Your Honor, not only is there no dual role in the derivative cases for Richards, Layton & Finger in this bankruptcy case, there is no role for Richards, Layton & Finger in the derivative actions in this bankruptcy case.

Again, Your Honor, where is Richards, Layton & Finger's actual conflict in this bankruptcy case on derivative claims? The debtors respectfully submit there is none.

And Your Honor, it bears repeating that the facts we've been discussing for the last ten minutes or so are unrebutted.

Your Honor, your task today is to consider this substantial evidentiary record, exercise your discretion, and determine whether the United States Trustee has carried its burden of demonstrating, based on facts, not speculation, that it is likely that Richards, Layton & Finger would be placed in a position permitting it to favor the directors over the debtors in this bankruptcy case. The debtors respectfully submit that the United States Trustee has not and cannot carry that burden and it's not a close call. The most you have is an appearance of a conflict, which itself vanishes upon close inspections of the facts and circumstances.

Your Honor, as reflected in Ms. Leonard's declaration, which is Exhibit 6, Richards, Layton & Finger is the debtors' choice for Delaware restructuring counsel. And on this record, there is no basis to nullify the debtors' decision. Your Honor, we would respectfully submit that that should end today's inquiry, but let's briefly talk about potential conflicts.

This Court has discretion to determine both whether a potential conflict exists and, if so, whether that potential conflict is disqualifying. The debtors respectfully submit there is no potential conflict here for the reasons already expressed. To quickly summarize, Your Honor:

The chances of a dispute arising between the debtors and the directors in these bankruptcy cases on derivative claims or indemnification claims is remote. And if such a dispute did arise during these cases, Richards, Layton & Finger would not represent the debtors or the directors on any of those issues in dispute. Richards, Layton & Finger would not be involved at all. There simply is no potential conflict on matters in which Richards, Layton & Finger is involved.

Again, Your Honor, that should end the inquiry. But solely for the purposes of discussion, let's assume there's a potential conflict here. Based on a twenty-five-year-old decision from the New Jersey Bankruptcy Court in BH&P, the United States Trustee argued that this Court has almost no discretion where a potential conflict exists and can approve Richards, Layton & Finger's retention only where, either no other competent counsel is available, or the potential is remote, and there are compelling reasons for employing the professionals.

But Your Honor, that clearly is not the law of the Third Circuit, which consistently has held that Bankruptcy Courts have substantial discretion, not only to decide whether a potential conflict exists, but also whether the potential conflict is disqualifying based on the facts and circumstances before the Court.

We've cited several cases for that proposition in our reply brief at Paragraph 47. One of those cases is the Third Circuit's Marvel decision. And Marvel demonstrates, Your Honor, beyond any doubt, that the United States Trustee's citation of the Third Circuit's BP&H decision for the proposition that the Bankruptcy Court has almost no discretion in the face of a potential conflict is clearly wrong. And I'm citing Marvel at 140 F.3d 477, where the Third Circuit said the following, quote:

> "We reiterate the teachings of BP&H: Section 327(a) presents a per se bar to the appointment of a law firm with an actual conflict, and gives the District Court wide discretion in deciding whether to approve the appointment of a law firm with a potential conflict."

Not the narrow discretion that the U.S. Trustee proposes, but "wide discretion," in the words of the Third Circuit.

Your Honor, assuming that there is a potential

conflict here, with which we disagree, but making that assumption, the facts and circumstances suggest the Court should exercise its wide discretion to approve Richards, Layton & Finger's retention. Those facts and circumstances include the following:

In the unlikely event that a dispute arises between the debtors and the directors in this bankruptcy case, Richards, Layton & Finger will not be involved, period, full stop.

Richards, Layton & Finger was up front in disclosing its representation of the directors consistent with the Rules of Professional Responsibility.

Richards, Layton & Finger obtained consents and waivers from the debtors and the directors.

No party other than the United States has objected. So the parties with an actual financial or economic interest in this case and who would be affected by Richards, Layton & Finger's purported potential conflict have not expressed a concern that Richards, Layton & Finger will favor the directors at the expense of the debtors.

And Your Honor, consistent with best practices, Richards, Layton & Finger also erected an ethical screen between its bankruptcy lawyers and its corporate lawyers.

I guess, I think the last thing I would say, Your Honor, is Richards, Layton & Finger's representation of the

debtors in this case will occur, not only under the supervision of this Court, but also under the watchful eyes of the United States Trustee and two committees, none of whom will be shy about raising an issue if they believe Richards, Layton & Finger is coloring outside the line.

Your Honor, these facts, which, again, are unrebutted, should give the Court comfort that, even if there is a potential conflict here, Richards, Layton & Finger has taken appropriate steps to ameliorate it.

I think I've said enough, Your Honor, so let me quickly wrap up. For these reasons, the debtors respectfully request that the Court grant their application to retain Richards, Layton & Finger as Delaware co-counsel.

Your Honor, thank you for hearing us today. Does the Court have any questions of me?

THE COURT: No. Let me hear from the U.S. Trustee.

MR. STEARN: Thank you, Your Honor.

MR. HACKMAN: Good morning, Your Honor. Again, may it please the Court, Ben Hackman for the U.S. Trustee.

Thank you, Your Honor, for your time today in hearing us on our objection.

We filed an objection to Richards, Layton & Finger's retention application on August 18th at Docket Item 267. We respectfully submit that RLF cannot be retained under Section 327(a) or 327(c) of the Bankruptcy Code because

it represents interests adverse to the estate and the firm has actual conflicts of interest.

327(a) of the Bankruptcy Code permits the retention of professional persons that do not hold or represent an interest adverse to the estate and that are disinterested persons. The Bankruptcy Code does not define "adverse interest." In the context of Section 327(a), a court may consider an interest adverse to the estate when counsel has a competing economic interest tending to diminish estate values or to create a potential or actual dispute in which the estate is a rival claimant.

Section 327(c) of the Bankruptcy Code provides that, in Chapter 11 cases, a person is not disqualified from employment solely because of a person's representation of a creditor unless there's objection by the United States Trustee, in which case the Court shall disapprove such employment if there is an actual conflict of interest. The Bankruptcy Code does not define "actual conflict of interest."

As Mr. Stearn alluded to, in the Boy Scouts case before the Third Circuit, the Third Circuit wrote that:

> "A conflict of interest is actual when the specific facts before the Bankruptcy Court suggest that is likely that a professional will be placed in a position permitting it to favor one interest over

an impermissibly conflicting interest."

And that's 35 F.4th at 158.

In the derivative suits, Your Honor, RLF represents interests adverse to these bankruptcy estates. Mr. Kroll's first-day declaration at Exhibit 4, in Paragraph 55, identifies five pieces of securities litigation. RLF represents certain D&O defendants in three of those five pieces of litigation.

First, RLF is Delaware counsel to four former D&Os in Delaware District Court, Case Number 21-CV-604. That lawsuit is derivative. The amended complaint is Exhibit 9, and it generally alleges that Lordstown was acquired by a special purpose acquisition company, or a SPAC, which initially targeted a business with a real estate related component and with an enterprise value of between 350 million and $2 billion.

The plaintiffs allege that this SPAC, up against a two-year limit to complete a business combination under the terms of its initial public offering, rushed to complete a reverse merger with Lordstown. The plaintiffs allege that a material false and misleading statements regarding Lordstown's demand and production capabilities were made both before and after the merger had closed.

The plaintiffs assert claims for alleged violations of the Securities Act, breach of the fiduciary duties of

candor and loyalty, and unjust enrichment. There is an allegation that current director David Hamamoto engaged in insider selling when he sold 1 million shares of Lordstown stock for over $16 million the day before the de-SPAC merger closed in October 2022.

Second, RLF is counsel to the same four former D&O defendant, plus current director Mr. Hamamoto in a suit in Delaware Chancery Court, Case Number 2021-1049. That lawsuit is also derivative. We did not specifically refer to this as a derivative suit in our objection because it was difficult to flesh that out. It's referenced in the supporting declaration of Mr. Gross in a footnote, but, as far as we can tell, is not identified there as being derivative. But if you cross-reference Footnote 4 of Exhibit 5 with Paragraph 55 of Exhibit 4, Mr. Kroll's first-day declaration, I think the record shows that this Chancery Court matter was derivative.

The complaint in that derivative suit is Exhibit 43, and it generally arises from the same facts and asserts the same allegations as the derivative suit in District Court. Bottom line, RLF is Delaware counsel to a current director accused of insider selling to the tune of over $16 million in a pending derivative suit in Chancery Court.

The claims in the derivative suits belong to the bankruptcy estate, under Judge Sontchi's RNI Wind Down decision, 348 B.R. 286. The debtors have a fiduciary duty to

maximize the value of those claims. At the same time, RLF's D&O clients in the derivative suits have the opposite interests; namely, to minimize their liability from those same claims. If RLF's retention is approved, the firm would be representing clients who are simultaneously trying to maximize and minimize the value of the same claims.

We think the debtors' estates have an interest in the advice RLF is giving to Mr. Hamamoto about the insider selling claim against him that is the subject of the two derivative suits, and we think that crystalizes the conflict.

The third piece of litigation where RLF represents D&O defendants is a direct suit in Delaware Chancery Court, Case Number 2021-1066. RLF represents the same four former D&Os and Mr. Hamamoto. The direct action is two consolidated putative class action lawsuits, asserting claims for breach of fiduciary duty against certain directors and officers.

The plaintiffs in the direct action allege -- essentially allege, not simple mismanagement, but serious misconduct, what is, in essence, a get-rich scheme executed at the expense of Lordstown and misinformed and/or uninformed investors. The direct action complaint alleges that the defendants, in particular Mr. Hamamoto, breached their fiduciary duties of candor and loyalty.

According to Mr. Kroll's first-day declaration, the defendants in the direct action in Chancery Court have

asserted indemnification rights against the debtors. Mr. Kroll's declaration also says that the debtors tendered claims with respect to the "securities actions," a term defined to include the litigation where RLF is involved, and that the debtors' primary and excess insurers under the post-SPAC merger D&O policy have taken the position that no coverage is available for the vast majority of the securities actions. That's Exhibit 4, Paragraph 57.

Mr. Kroll's first-day declaration says that, pre-petition, the debtors spent more than $60 million in out-of-pocket fees associated with legal time and consulting and administrative expenses, including costs to fulfill the debtors' indemnification obligations to current and former Ds and Os. That's at Paragraph 56.

Those out-of-pocket expenses were one of the precipitating causes of these bankruptcy cases, as referenced in Mr. Kroll's declaration at Paragraphs 56 and 59 through 60.

We respectfully submit that RLF represents interests adverse to the bankruptcy estate and, therefore, is not eligible to be retained under Section 327(a). In the derivative actions, RLF represents D&O defendants who are trying to minimize their liability on the same claims that the debtors have a fiduciary duty to maximize.

In the direct action, RLF represents D&O defendants

with indemnification claims against the estate. In other words, RLF represents creditors who are seeking to recover from the estate. And one of those creditors is a current director. The debtors have an obligation to object to any claim that isn't proper, including, potentially, if a purpose would be served -- including, potentially, the indemnification claims asserted by RLF's D&O clients.

In the direct and the derivative suits, RLF represents interests that tend to diminish estate values or create a potential or actual dispute in which the estate is a rival claimant. The derivative suits are not speculative or hypothetical or academic, they are pending. The complaints are filed, they are detailed. The derivative claims exist now. The estate has a fiduciary duty to maximize the value of those claims now and the D&Os have an interest in minimizing their liabilities on those same claims now. RLF is on both sides of that fight.

If insurance pays for any liability, then there is less in proceeds for the estates to recover from. If the estate pays for any liability, then there is less in the estate assets to distribute to other creditors or shareholders. We submit that there is an actual conflict of interest.

We think the actual conflict of interest is manifested in the debtors' Chapter 11 plan. It's located at

Docket Item 360 and it's Exhibit 27 in today's exhibit binder.

Page 1 of the plan shows RLF as debtors' proposed counsel. I believe Mr. Stearn referenced Article 5(j) of the plan as authorizing the debtors -- post-effective-date debtor to prosecute causes of action post-effective-date. We read Article 5(j) as being broader than that. We read it as giving the post-effective-date debtors unilateral authority to release, abandon, or not pursue any of the debtors' claims, including against D's and O's, without court oversight or third-party involvement.

In other words, as we read Article 5(j) of the plan, it gives the post-effective-date debtors the ability to let RLF's D&O clients off the hook. Article 5(j) of the plan says, quote:

"Post-effective-date debtors shall retain and" --

In relevant part:

"... may enforce all rights to commence and pursue as appropriate, any and all of the debtors' causes of action."

Which includes (iii):

"-- any causes of action against the debtors' directors and officers that are identified as excluded parties."

As we read that, that covers former D's and O's.

It says:

"The post-effective-date debtors shall have the exclusive right, authority, and discretion to determine and to initiate, file, abandon, release withdraw, or litigate to judgment any such causes of action and to decline to do any of the foregoing without the consent or approval of any third party or further notice to or action, order, or approval of the Bankruptcy Court."

As we read in the plan, as to current director Mr. Hamamoto, we believe he'll receive a debtor release under Article 8 or the post-effective-date debtors retain discretion to give him a release under Article 5(j) without further Bankruptcy Court approval. RLF is on both sides of the estate's adversity with the D's and O's. And RLF appears on Page 1 of a plan that will give the post-effective-date debtors total discretion to release or abandon the D&O claims.

For these reasons, we respectfully submit that RLF represents an interest adverse to the estate under Section 327(a) and has an actual conflict of interest in the section -- meaning of Section 327(c) and, as such, is not eligible to represent the debtors.

The debtors argue in their reply that RLF's representation of both the debtors and the D's and O's is

permissible because the derivative actions are pre motion to dismiss. We believe that argument is flawed for two reasons:

First, we would submit that the type of claim being asserted against the D's and O's matters. In Bell Atlantic Corp. v. Bolger, 2 F.3d 1304 (3d Cir. 1993), which had admittedly survived a motion to dismiss, it was post motion to dismiss. The Third Circuit wrote that which duty that was alleged to have been breached was material to whether a firm could represent both the corporation and the D's and O's.

The Third Circuit wrote that the plaintiffs there had alleged only a breach of the duty of care, not a breach of the duty of loyalty. That's in cite 1316, 2 F.3d 1316.

The Court wrote:

"We have no hesitation in holding that -- except in patently frivolous cases -- allegations of directors' fraud, intentional misconduct, or self-dealing require separate counsel. We recognize that corporate law has traditionally distinguished between breach of the duty of care and breach of the duty of loyalty, the latter being more grave" ...

"We do not believe the District Court abused its discretion in allowing common counsel here. We note, however, that in cases where the line is blurred between duties of care and loyalty, the

better practice is to obtain separate counsel for individual and corporate defendants."

Here, as we read the complaints where RLF represents D's and O's in pending litigation, we read them as alleging breaches of fiduciary -- the fiduciary duty of loyalty.

In the derivative complaint in District Court, Exhibit 9, it alleges breach of the fiduciary duty of loyalty at Paragraphs 220 through 222, 224, and 226.

The derivative complaint in Chancery Court at Exhibit 43 alleges breach of the fiduciary duty of loyalty at Paragraph 104.

The direct complaint at Exhibit 10 alleges breach of the duty of loyalty at Paragraphs 158 through 163.

Second, we think the notion that RLF's representation is okay because the derivative actions are pre motion to dismiss is flawed because the debtors have filed a Chapter 11 plan that gives the post-effective-date debtors unilateral authority to decide that those derivative suits would never even get to a motion to dismiss. They could simply release those claims. That's how we read Article 5(j) of the debtors' plan, no Bankruptcy Court approval required. And again, Page 1 of the plan shows RLF as debtors' proposed counsel.

Ultimately, we understand the debtors' argument for

retaining RLF as boiling down to this: We've done everything we can to mitigate any adversity and conflict. There's a conflict waiver, there's an ethical law, and the debtors have retained special litigation counsel. That's close enough under Section 327(a). We submit that there is no such thing as close enough under 327(a). The statute is satisfied or it isn't. As the debtors -- the conflicts waivers the debtors acknowledge in their reply in Paragraphs 5 and 49, but a conflict waiver is not enough to satisfy Section 327(a).

We would submit that the same thing goes for an ethical wall. The debtors are not tryign to retain one side of RLF. They're tryign to retain the whole firm. Nothing in Section 320(a) -- 327(a) suggests that a lack of disinterestedness or representing an adverse interest can be cured by an ethical wall.

As to special litigation counsel, the debtors have retained Winston & Strawn to investigate the derivative claims. But Winston & Strawn's retention application was filed 11 days after the debtors had already filed their Chapter 11 plan, which, again, as we read it, reserves the post-effective-date debtors' complete discretion to make the derivative claims against D's and O's go away, including against RLF's clients. RLF is on Page 1 of that plan. Special counsel cannot unring that bell.

There is an equity committee here and it can serve

as a check on management. But the equity committee was appointed on September 7th, which was a month and a half after the objection deadline on RLF's retention had passed. Thus, we think that the debtors' contention that the U.S. Trustee is the only party-in-interest objecting and doesn't have a financial stake in it is slightly off base.

We don't understand why the debtors are insisting that their local counsel must be RLF, given its prior representation of the D's and O's. RLF only began representing the debtors in connection with these cases five or six days before the petition date. That's Exhibit 5 at Paragraph 15(c).

And the debtors did not look at any other firm as a candidate for local counsel. According to Ms. Leonard's declaration, which is Exhibit 6, at Paragraph 2, she states that:

> "White & Case recommended to the debtors that the debtors retain RLF -- RL&F as their bankruptcy co-counsel" ...
>
> "Under the circumstances, the debtors did not believe it was necessary to interview or consider other firms to serve as bankruptcy co-counsel."

We respectfully submit that Your Honor does not need to indulge lead counsel's first choice of local counsel in every case, the particular facts and circumstances

notwithstanding.

RLF says it won't represent the debtors or D's and O's on any matters involving one another. But it appears from where we stand that RLF already has waded into the fray.

First, RLF signed and filed the adversary complaint seeking to extent the automatic stay to shield the defendants in the direct suit in Chancery Court, which includes RLF's former D&O clients.

And again, secondly, RLF is shown as counsel on a plan that, as we read it, would give the post-effective-date debtors unilateral authority to abandon or release claims against D's and O's, including RLF's clients, without Bankruptcy Court oversight.

The D&O claims here, Your Honor, permeate the case. The alleged acts or omissions at issue led to the pre-petition lawsuits that led to the debtors incurring significant out-of-pocket costs that helped precipitate these Chapter 11 cases. It led to stayed litigation post-petition before Your Honor. And now they're addressed in a Chapter 11 plan.

These aren't residual assets. The debtors filed the case with a large amount of cash on hand. But at this point, with the pending proposed sale to mister -- the company with which Mr. Bird is affiliated for $10 million later this month, the main assets left in the estate, from

our perspective, appear to be any claims against Foxconn and the D&O claims.

To conclude, Your Honor, we'd respectfully submit that RLF represents adverse interests in the debtors' estates and has an actual conflict of interest. And under the plain language of Sections 327(a) and 327(c) of the Bankruptcy Code is not eligible to serve as debtors' counsel in these cases. The Court should deny RLF's retention application.

Unless Your Honor has any questions, that's all I have.

THE COURT: No, thank you.

MR. HACKMAN: Thank you, Your Honor.

MR. STEARN: A brief response, Your Honor?

THE COURT: Yes.

MR. STEARN: Your Honor, I return to where I started, which is that the United States Trustee in its arguments, with due respect to them, are failing to consider important facts and misapplying the law as a result.

The question today is whether the U.S. Trustee has demonstrated that it is likely that Richards, Layton & Finger would be placed in a position permitting it to favor the directors over the debtors in this bankruptcy case. That is the fundamental question as the Third Circuit has posed it.

In the derivative action, as a matter of law, there's no conflict at this stage of the proceeding.

Let's talk about Bell Atlantic for a second. And Bell Atlantic actually is more of a sideshow than anything else. This case doesn't implicate the concerns of Bell Atlantic for several reasons:

First, Your Honor, the debtors are not asking the Court to approve Richards, Layton & Finger's dual representation of the debtors and the directors in the derivative litigation or in this bankruptcy case. We're simply responding to the U.S. Trustee's argument that there's as conflict and demonstrating why, under Delaware law, that's actually not true at the motion to dismiss stage.

As Mr. Hackman noted, also, Bell Atlantic was not a motion to dismiss case. It evaluated the propriety of derivative and individual defendant representation where there was a settlement and whether or not it was appropriate to have the same counsel representing both the company and the individual defendants, where, of course, any recovery would go to the company, but still in that case found it not to be inappropriate. Bell Atlantic doesn't even discuss, much less opine on whether dual representation is appropriate at the motion to dismiss stage. It's simply not controlling or relevant here.

And as I said, we're not asking the Court to approve a dual representation in this case with respect to derivative claims. In fact, in the derivative claims, not

only will those claims not proceed during this case, but Richards, Layton & Finger will not be involved at all.

And let's talk about something Mr. Hackman said which also reflects a misunderstanding by the United States Trustee of the facts of the case.

Purportedly, Richards, Layton & Finger, as reflected in the plan, somehow will weigh in on whether or not the claim against the D's and O's will be released or how that will be treated. That's demonstrably untrue, Your Honor, not only because the record before you, for example at Mr. Gross' declaration, expressly states that Richards, Layton & Finger would not be involved in any such claims, also because the retention order -- and I read the provision a few moments ago, expressly states Richards, Layton & Finger cannot be involved in any such claims or the valuation thereof.

I should go back and -- I won't reread the -- I won't reread the provision. Your Honor doesn't need to hear it again.

The fact of the timing of Winston & Strawn's actual retention by the Court is irrelevant because it was always going to be the case that someone other than Richards, Layton & Finger was going to look at the derivative claims, whether that was lead counsel, White & Case, or special counsel, which in this case is Winston & Strawn. Mr. Gross'

declaration proved and the draft retention order, proposed retenion order requires that Richards, Layton & Finger not be involved in precisely the issue that Mr. Hackman says Richards, Layton & Finger would be involved. That's simply an incorrect statement, Your Honor.

And given these facts, how could Richards, Layton & Finger exercise some sort of discretion, as Mr. Hackman says, to favor the directors over the defendants in this bankruptcy case when Richards, Layton & Finger can have no involvement in those issues whatsoever, both as represented in Mr. Gross' declaration and as required by the Court's retention order? That's simply untrue, Your Honor.

In terms of the direct action, I'll note parenthetically that those large indemnification claims that accrued previously, that wasn't us. That was largely out of the SEC investigation and things like that.

But again, think about what is the conflict, if any, in this case. There's no indemnification claim accruing currently. Richards, Layton & Finger would not handle indemnification on either side of the ledger. But once again, I come back to the relevant inquiry as posed by the Third Circuit: Is it likely that Richards, Layton & Finger would be placed in a position permitting it to favor the directors over the debtors in this bankruptcy case on indemnification claims? No, it is not.

Your Honor, the last couple of things I say -- and I apologize, this may be a little haphazard because I'm trying to respond to some of my colleague Mr. Hackman's arguments.

He said close enough is not the issue, the question is whether this satisfies Section 327 or not. I have no dispute with that argument because, clearly, the U.S. Trustee has not demonstrated that we don't satisfy Section 327. There's no actual conflict of interest, there's no potential conflict of interest, and even if there is a potential conflict of interest, we have ameliorated that potential conflict of interest through the use of conflicts counsel.

Delaware cases consistently provide that conflicts counsel solves the problem. Several recent cases decided by your colleagues reached that conclusion: Judge Silverstein in Boy Scouts and Judge Dorsey in FTX, where there were issues with the debtors' choice of Delaware -- or excuse me -- lead counsel in that case. Conflicts counsel solved the problem. So it's not that conflicts counsel brings you close enough. It's that conflicts counsel helps you satisfy the requirements of Section 327, which we've clearly done here.

The last thing I would say, Your Honor, is, look, Richards, Layton & Finger has been involved in this case for several months. Now it's not just five to six days, but for several months. It's taken us awhile to get before Your

Honor because the parties -- well, Richards, Layton & Finger and the U.S. Trustee were cordial with each other; when the U.S. Trustee requested extensions, we provided it; when the U.S. Trustee requested further information, we always provided it, we gave the U.S. Trustee everything that they wanted. And there were times when the U.S. Trustee said they didn't consent to going forward on a particular hearing date, and we generally honored that request or that statement. And it wasn't even until last Friday that the U.S. Trustee finally said we consent to going forward on October 5. So we have gotten in front of Your Honor as promptly as we could.

But it's also the fact that, under these circumstances, the debtors wouldn't be losing five to six days of Richards, Layton & Finger's knowledge, it would be losing two or three months of Richards, Layton & Finger's knowledge, which then someone else would have to come up to speed on in a case that the debtors are trying to confirm promptly, this year. That's certainly not in the debtors' best interests, Your Honor.

So, again, I'll wrap up. We think -- we respectfully submit that, looking at the conflicts question from the debtors' perspective, not the U.S. Trustee's perspective, as the Third Circuit requires, there is no Section 327(a) disabling conflict; and, accordingly, the debtors' determination of who they would like for their local

counsel, regardless of whether they made that decision independently or with the advice of other counsel -- which is you would think how clients typically make such decisions -- that decision should be respected. And we respectfully request that Richards, Layton & Finger's retention application be granted. Thank you, Your Honor.

THE COURT: Let's take a five-minute break and I'll come back with my decision.

(Recess taken at 11:34 a.m.)

(Proceedings resume at 11:52 a.m.)

(The Court's microphone not recording)

THE COURT: All right. It's still good morning. This is Judge Walrath and I am prepared to rule on the request of the debtors to authorize their retention of Richards, Layton & Finger as Delaware counsel, local counsel.

For the reasons that I will go into, I believe that I cannot authorize that retention because I find that RLF has an actual conflict and the United States Trustee has objected to that retention. Under the express language of 327(c), I shall not authorize that retention.

I appreciate the arguments of counsel and especially counsel for RLF. But I think that RLF and the debtor look too narrowly at the conflict issue. I don't think that the Court is limited or can narrowly look only at what counsel has proposed to do in the bankruptcy case.

This is a retention under 327(a), not under 327(e) for a special purpose; and, therefore, the Court must consider all of the actions of counsel, not just what counsel has proposed to do in the bankruptcy case. And I think that, considering what counsel is doing in the direct and derivation action cases outside of this Court, I must consider whether those actions will have an adverse effect on this estate, and I find that they will.

The actions are in direct conflict, both of them are in direct conflict with the estate's interests in those actions.

In the direct action case, RLF is representing a party which admittedly has an indemnification claim against the debtor and, therefore, is a creditor. And the continued defense of that action is increasing the indemnification claim.

While R-L -- while Mr. Stearn asserts the fact that there is insurance to cover that claim and the insurers are paying the defense costs does not eliminate the fact that it is a claim against the estate. The insurer is covering the claim against the estate and it is reducing insurance coverage for those actions. There is persuasive authority that, while defense costs get paid first, the debtor may have an interest in the insurance, to the extent there is any funds left. So simply representing the defendants in a

direct action is a direct -- has a direct adverse claim -- adverse effect on the debtors' estate.

The derivative action is even clearer. The estate holds that claim and has an interest in maximizing that claim. At the same time, RLF is representing defendants that have an interest in minimizing the value of those claims. The fact that the debtors' prosecution of the derivative actions may not be litigated during the course of this case because of the automatic stay does not eliminate that. The estate still has an interest in pursuing those cases.

And quite frankly, the retention of conflicts counsel does not solve the issue. The typical retention of conflicts counsel is to eliminate a conflict arising from counsel -- debtor's counsel's prior representation of a creditor or because of its prior or current representation of that creditor in other matters, it is not permitted to be retained by the debtor. Again, this is the circumstance of getting a 327(e) counsel involved. I'm not persuaded that the retention of Winston in this case eliminates the actual conflict of RLF representing parties directly against the debtor -- the debtors' interests. Excuse me.

And I am also concerned with the effect of the language in the plan that could eliminate claims that the estate may have against the defendants in the direct and in the derivative action case. I think the actual conflict is

that RLF is continuing to represent the defendants in those two actions.

And while I find it interesting and significant that both actions allege a breach of the duty of loyalty as well as other breaches of fiduciary duties by RLF clients, I don't think that is necessary. I think any action alleging a breach of fiduciary duty against clients that is continuing rep -- to be represented by counsel for the debtor creates an actual conflict. I don't see any leeway here.

And although the parties didn't cite it, I will refer them to the case -- the In Re Harris Agency case out of the Eastern District of Pennsylvania, 462 B.R. 514, where the Court found an actual conflict of interest where counsel for the debtor, at the time it was representing the debtor, also represented a co-obligee -- co-obligor of the debtor on a loan -- sorry about that -- a co-obligor on the loan and seeking to have that co-obligor be found not liable ...

What is going on? Hold on a second. Let's see.

(Court and court personnel confer)

THE COURT: It is on.

(Court and court personnel confer)

THE COURT: That's worse. Do you want me to turn it off?

(Court and court personnel confer)

(Recording microphone on at 12:00:06)

THE COURT: All right. Counsel for the debtor, at the same time, was representing a co-obligor of the debtor in a lawsuit outside of the bankruptcy, seeking to eliminate his obligation. The Court found it was an actual conflict because it would reduce the estate by eliminating a possible other source of recovery for that creditor.

And I think the direct action is similar in this case. By defending that action, it's reducing a recovery that creditors or shareholders of this estate may recover.

I just don't see any leeway here. I don't see -- it's not a potential conflict; it's an existing actual conflict, and so I have no discretion to deny the -- but to deny the retention application.

So I'll ask for a proposed form of order to be filed under certification of counsel.

MR. STEARN: Thank you for hearing us today, Your Honor.

THE COURT: Thank you.

MR. HACKMAN: Thank you very much.

THE COURT: All right. We'll stand adjourned then.

MR. HACKMAN: Thank you, Your Honor.

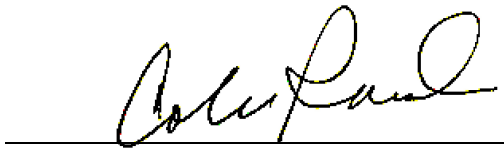
THE COURT: I did originally have it still muted, still off, so that's what originally caused it. Sorry.

(Proceedings concluded at 12:01 p.m.)

*****

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter to the best of my knowledge and ability.



October 5, 2023

Coleen Rand, AAERT Cert. No. 341

Certified Court Transcriptionist

For Reliable